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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 196[illegible]

No. [illegible] 146

JOSEPH CHOBOT,
Appellant

vs.

STATE OF WISCONSIN,
Appellee

On Appeal From the Supreme Court, State of Wisconsin

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

JOSEPH CHOBOT,
Appellant

vs.

STATE OF WISCONSIN,
Appellee

On Appeal From the Supreme Court, State of Wisconsin

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Wisconsin on November 29, 1960, (motion for rehearing dismissed February 7, 1961) affirming a judgment of conviction in the Circuit Court, County of Milwaukee, State of Wisconsin, and submits this statement to show that the Supreme Court of the United States has jurisdiction on the appeal, and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 12 Wis. (2nd) 110, 106 N.W. (2nd) 286, and is attached as Appendix C, *infra*, p. 17.

The opinion of the Circuit Court of Milwaukee County, State of Wisconsin, is unreported, and is attached hereto as Appendix D, *infra*, p. 27.

The order denying motion for rehearing before the Supreme Court of the State of Wisconsin is not reported, and is attached hereto as Appendix E, *infra*, p. 39.

JURISDICTION

This case was commenced September 18, 1960, pursuant to a warrant for the arrest of Defendant Joseph Chobot for having in his possession for sale lewd, obscene and indecent matter in violation of 944.21(1)(a), Wisconsin Statutes (R. 100).[1]

The Defendant, after waiving trial by jury, was found guilty in the Circuit Court of Milwaukee County on April 27, 1960, (Appendix D).

The Defendant appealed the decision of the trial court to the Supreme Court of the State of Wisconsin, and on November 29, 1960, and that court affirmed the trial court (Appendix C). A timely motion for rehearing was filed December 16, 1960, (R. 146) and was denied February 7, 1961, (R. 147). Notice of Appeal to the United States Supreme Court was filed with the Wisconsin Supreme Court on April 14, 1961.

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[1]Record references thus designated refer to page numbers in the appendix filed by Appellant in the Supreme Court of Wisconsin which, together with certified copies of Appellant's briefs, supplemental appendix of Appellee, and exhibits, will constitute the printed record certified by the Wisconsin Supreme Court on this appeal.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by *28, U. S. C., Section 1257(2)*, since the validity of a state statute on grounds of repugnancy to the Constitution of the United States and its amendments is drawn in question. The following cases sustain the jurisdiction of the Supreme Court to review the judgment in this case:

Mounce vs. United States, 355 U.S. 180;

One vs. Olesen, 355 U.S. 371;

Times Film Corporation vs. City of Chicago, 355 U.S. 35;

Near vs. Minnesota, 283 U.S. 697;

Sunshine Book vs. Summerfield, 355 U.S. 372;

Smith vs. California, 361 U.S. 147;

Joseph Burstyn, Inc. vs. Wilson, 343 U.S. 495;

Kingsley Pictures Corp. vs. Regents, 360 U.S. 684.

QUESTIONS PRESENTED

1. Whether the application of Section 944.21(1)(a) of the Wisconsin Statutes, by the State of Wisconsin, is in conflict with the First and Fourteenth Amendments to the United States Constitution.
2. Whether the evidence in this case established the scienter required in a criminal prosecution of this kind by the due process clause of the Fourteenth Amendment to the United States Constitution.
3. Whether the evidence was sufficient to support the conviction and therefore meets the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

Wisconsin Statutes (1957):

Section 944.21(1)(a)

Text is set out in Appendix A, *infra*, p. 16.

Federal Statutes:

First Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Text is set out in Appendix B, *infra*, p. 16.

STATEMENT

The Appellant was arrested pursuant to Section 944.21 (1)(a), Wisconsin Statutes, for having in his possession for sale lewd, obscene and indecent matter.

Trial was had to the Circuit Court of Milwaukee County, Wisconsin, wherein Appellant waived the jury.

The State introduced thirteen magazines which it claimed were obsence.

The only testimony introduced by the State at the trial was the testimony of the arresting officer to the effect that Exhibits 1 through 13, magazines containing photographs of nudes, were in the possession of the Appellant, Joseph Chobot, immediately prior to the arrest. Appellant stipulated that he did have such magazines in his possession and that they were for sale.

The Appellant introduced Exhibits 16-26, all copies of *Playboy* magazine, as evidence that community standards included and accepted magazines containing pictures of nude women, and Exhibits 14 and 15, copies of *Peyton Place* and *Lady Chatterley's Lover*, as evidence that books which dealt with sexual conduct were widely read and accepted in the Community.

The trial court ruled that nine of the State's thirteen exhibits were not obscene, and that four of the State's exhibits were obscene, thereby finding Appellant guilty as charged (Appendix D).

This appeal is taken from the Wisconsin Supreme Court decision affirming the judgment of conviction (Appendix C).

HOW THE FEDERAL QUESTION IS PRESENTED

The application and enforcement of Section 944.21(1)(a) of the Wisconsin Statutes under the facts of this case is invalid on the grounds that such application and enforcement is in conflict with, and contrary to, the guarantees of freedom of speech and press under the First and Fourteenth Amendments to the United States Constitution.

Where the State Court applies a statute to a set of facts in conflict with Federal law, such application is invalid. *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S. 282 (1921).

With respect to the procedure used to assert this contention in the lower courts, Wisconsin has no specific statutory method of raising a Federal question in a criminal case where it is contended that the application of a State Statute is in conflict with Federal law or with the Federal Constitution.

Accordingly, Appellant raised the Federal question at every available opportunity in oral argument and in briefs before the trial court and the State Supreme Court.

The trial court recognized the Federal issue by stating in its decision that the finding of guilt under the State law did not violate the First and Fourteenth Amendments to the United States Constitution, (Appendix D, *infra*, pp. 27 through 38) (R. 102, 103, 105).

The Wisconsin Supreme Court clearly recognized the Federal issue by holding that the conviction of the Defendant in the instant case did not violate the Federal Constitution, (Appendix C, *infra*, pp. 7 through 27) and by quoting in full the texts of the First and Fourteenth Amendments to the United States Constitution, (Appendix C, *infra*, p. 17).

THE QUESTIONS ARE SUBSTANTIAL

I.

The State of Wisconsin in this case has applied an obscenity law to convict the Defendant who was in possession of the kind of magazines which were held not obscene under past decisions of this Court.

Mounce vs. United States, 355 U.S. 180 (1957);

One vs. Olesen, 355 U.S. 371 (1957);

Times Film Corp. vs. City of Chicago, 355 U.S. 35 (1957);

Sunshine Book vs. Summerfield, 355 U.S. 372 (1957).

Freedom of speech and press, guaranteed under the First Amendment to the United States Constitution, are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Gitlow vs. New York, 268 U.S. 652, 666 (1925);

Whitney vs. California, 274 U.S. 357 (1927);

Fiske vs. Kansas, 274 U.S. 380 (1927);

Near vs. Minnesota, 283 U.S. 697 (1931);

Joseph Burstyn Inc. vs. Wilson, 343 U.S. 495 (1952);

Beauharnais vs. Illinois, 343 U.S. 250 (1952);

Lovell vs. Griffin, 303 U.S. 44, 450 (1938).

Nevertheless, freedom of speech is not absolute.

In *Chaplinsky vs. New Hampshire*, 315 U.S. 568 (1942), this Court laid down the principles to be followed where speech or press might be suppressed:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572.

The "clear and present danger" rule requires that before an utterance can be penalized by Government, it must ordinarily have occurred "in such circumstances or have been of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of Government to prevent. *Schenck vs. United States*, 249 U.S. 47 (1919). The question whether these conditions exist is one of law for the courts and ultimately for the Supreme Court in enforcement of the First and Fourteenth Amendments. *Whitney vs. California*, 274 U.S. 357 (1927); and in the exercise of its power of review in these premises this Court is entitled to review broadly the findings of fact of lower courts, whether State or Federal, in this important area of law, *Fiske vs. Kansas*, 274 U.S. 380 (1927).

In his concurring opinion in *Whitney vs. California*, 274 U.S. 357 (1927), Mr. Justice BRANDEIS stated the

philosophical reasons for the clear and present danger rule, which were to be later adopted by this Court:

> ". . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom." 274 U.S. at 377.

The clear and present danger rule was followed in *Thornhill vs. Alabama*, 310 U.S. 88 (1940); *Cantwell vs. Connecticut*, 310 U.S. 296, 308 (1940); *Board of Education vs. Burnette*, 319 U.S. 624, 633 (1943); *Terminello vs. Chicago*, 337 U.S. 1 (1949); *Pennekamp vs. Florida*, 328 U.S. 331 (1946); and *Craig vs. Harney*, 331 U.S. 367 (1947).

Perhaps the strongest assertion of the clear and present danger rule was made by Mr. Justice RUTLEDGE in *Thomas vs. Collins*, 323 U.S. 516 (1945), when he stated for a divided court:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . . For these reasons any attempt to restrict those liberties

> must be justified by clear public interest, threatened not doubtfully, or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses endangering paramount interests give occasion for permissible limitation." 323 U.S. at 529-530.

While this Court has stated in *Roth vs. United States*, 354 U.S. 476, that conviction may be had under an obscenity statute without proof that the obscene material would create a clear and present danger, the doctrine does not change the rule that speech or press may not be determined obscene without such showing.

Following the *Roth* case, the Court reiterated its position on the clear and present danger rule when the State of New York sought to ban the motion picture "Lady Chatterley's Lover". Speaking for a unanimous court, Mr. Justice STEWART stated:

> "Advocacy of conduct prescribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.'" *Kingsley Pictures Corp. vs. Regents*, 360 U.S. 684, 689 (1959).

Appellant urgently submits that only publications which contain hard-core pornography may be considered actionable as "obscene". This contention is fully supported by the cases asserting the clear and present danger rule,

as well as by the cases following *Roth v. United States, supra,* such as *Mounce v. United States, supra; One v. Olesen, supra; Times Film Corporation v. City of Chicago, supra; Sunshine Book v. Summerfield, supra;* and *Kingsley Pictures Corp. v. Regents, supra.*

II.

The Court of Appeals of the State of New York on May 25, 1961, decided that only publications containing "hardcore" pornography may be suppressed by the state pursuant to its obscenity statute. *People v. Richmond County News, Inc.* (No. 43, May 25, 1961) — — N. Y. — —, — — N.E. (2nd) — —.[2]

In a telephone conference with the Assistant District Attorney of Richmond County, Appellant's attorney was informed that the District Attorney of Richmond County is considering seeking a review of the New York Court of Appeals decision by petitioning this Court for a writ of certiorari.

This Court has usually granted certiorari where it was presented with a direct conflict in the decisions of Federal Courts of Appeals with respect to a Federal question[3] or where there existed a direct conflict between the decisions of a Federal Court of Appeals and the highest court of a state.[4] In the instant situation, where there is a clear and direct conflict between the decision of the New York Court of Appeals and the decision of the Wisconsin Su-

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[2]Because of its obvious importance, the decision of the New York Court of Appeals in its entirety, having not yet been reported, is incorporated herein in Appendix F, *infra,* p. 39.

[3]*Cf., United Brotherhood v. United States,* 330 U.S. 395, 400; *Shapiro v. United States,* 335 U.S. 1, 4.

[4]*Stern and Gressman, Supreme Court Practice* (2nd Ed., 1954) pp. 117-8.

preme Court in this instant case with respect to a substantial Federal question, it is imperative that this Court hear this appeal.

III.

The Appellant was convicted of selling obscene matter without knowledge of the alleged obscenity in violation of his right of Due Process under the Fourteenth Amendment to the United States Constitution and contrary to the rule established in *Smith vs. California,* 361 U.S. 147 (1959).

In the present case, of the four magazines found by the trial and appellate courts to be obscene, one of them, Exhibit 10, was deemed obscene because of two short stories (Appendix D, *infra,* p. 33).

Appellant testified that he had not read the text of the magazines; that he operated his store as a one-man operation; that he was busy selling books, magazines, chess sets and stamps, and that he was kept busy ordering books, putting them on shelves and waiting on customers (R. 129).

Exhibits 8, 9, and 12 were found obscene because of their pictorial content (R. 110). These magazines are identical in kind to those magazines constituting the subject matter in *Mounce vs. United States,* 355 U.S. 180, wherein the conviction was reversed.

Exhibit 10 was found obscene because of the text of two stories, albeit Appellant testified he had never read them.

This Court, in *Smith vs. California,* 361 U.S. 147 (1959), struck down a conviction under an obscenity ordinance where the ordinance did not require scienter

on the part of the bookseller on the ground that such conviction was a violation of defendant's rights as guaranteed under the Fourteenth Amendment to the United States Constitution.

The Appellant in the present case could not and should not be expected to have read all of the stories in all of the books and magazines he had in his possession.

As this Court warned while stating the purpose for the requirement of scienter,

> "If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public.... Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U.S. at 153-154.

IV.

The evidence introduced by the State was insufficient to support the conviction, and, therefore, does not meet the requirements of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

This Court has long held that where the evidence introduced by the State was not sufficient to support a conviction, such conviction must be set aside. *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886); *Moore vs. Dempsey*, 261 U.S. 86 (1923); *Schware vs. Board of Bar Examiners*,

353 U.S. 232 (1957); *Thompson vs. Louisville*, 362 U.S. 199 (1960).

The trial and appellate courts found Exhibits 8, 9, 10 and 12 to be obscene.

Yet, the above exhibits are identical in kind to the 4,200 magazines in *Mounce vs. United States*, 355 U.S. 180 (1957), where a finding of obscenity was reversed by this Court.

In *Roth vs. United States*, 354 U.S. 476 (1957), this Court laid down the criteria for a finding of obscenity, the test being ". . . whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In Note 20 at page 487 this Court adopted the following definition of prurient interest:

> ". . . a thing is obscene if considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representations of such matters. . ."

The State, in the instant case, did not introduce any affirmative evidence, other than the magazines in question, to meet and pass the tests laid down in the *Roth* case.

The State did not introduce one scintilla of evidence as to community standards, nor did it prove or attempt to prove that the contents of the magazines *substantially* exceeded customary limits of candor.

In fact, the contrary is true. Appellant introduced Exhibits 16-26, constituting eleven copies of *Playboy* magazine, as proof that such magazines as the State sought

to ban were well within the contemporary community standards prevailing in Milwaukee County.

William Aschmann, Manager of the Milwaukee News Company, testified that his net sales of *Playboy* in the Milwaukee County area were approximately 6,500 copies per month (R. 126, 127). Aschmann testified that, in addition to the copies of *Playboy* which his company sold, *Playboy* was delivered to Milwaukee also by mail subscription and that the U. S. Post Office accepted the magazine for delivery (R. 125, 126).

With respect to the printed text dealing with sex, Appellant introduced Exhibits 14 and 15 as proof that Milwaukee area reading habits (upon which community standards are based) resulted in the sale of 44,289 copies of *Peyton Place* between September, 1957, and February, 1959, (R. 119, 120).

Aschmann testified that in August and September of 1959 his company distributed and sold 4,526 copies of the unexpurgated version of *Lady Chatterley's Lover* (R. 121, 122).

The nudity displayed in *Playboy* is the same as that in Exhibits 8, 9, 10 and 12, and the text of Exhibit 10 is not more prurient than the text found in *Peyton Place* and *Lady Chatterley's Lover*. Therefore, the tests laid down in *Roth* were not met on two grounds, and the evidence introduced by the State was insufficient to support the conviction. First, the State failed to introduce any affirmative evidence to prove that Exhibits 8, 9, 10 and 12 appealed to prurient interests as defined in *Roth*, and also that the magazines went *substantially* beyond contemporary community standards. Second, the Appellant's exhibits affirmatively showed that Exhibits 8, 9, 10 and 12 were well within contemporary community standards.

Lastly, this Court is urged to compare Exhibits 8, 9, 10 and 12, found by the courts below to be "obscene", with Exhibts 1, 2, 3, 4, 5, 6, 7, 11 and 13, found not to be "obscene". The latter exhibits, not being "obscene", should also have been considered as well within contemporary community standards by the courts below.

CONCLUSION

We submit that the questions presented by this appeal are most substantial and that they are of great public importance.[5]

Moreover, the decision of the Wisconsin Supreme Court here under review is in direct conflict with the very recent decision of the New York Court of Appeals in *People v. Richmond County News, Inc., supra.*

These reasons appear to be so compelling that this Court cannot but grant this appeal and hear the case on the merits.

Respectfully submitted,

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[5]If it is deemed by this Court that Appellant has improvidently filed this appeal from the decision of the court below, then Appellant respectfully urges this Court to treat these papers as a petition for a writ of certiorari. 28 U.S.C., Section 2103.

APPENDIX A

Text of Wisconsin Statutes Involved

"944.21 *Lewd, obscene or indecent matter, pictures and performances.* (1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:

(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film;"

APPENDIX B

Text of Amendments to United States Constitution

Article I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article XIV.

"*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

DECISION IN SUPREME COURT OF WISCONSIN

State, Respondent, v. Chobot, Appellant.

November 4—November 29, 1960.

Appeal from a judgment of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Affirmed.*

The defendant Joseph Chobot was found guilty of possessing and having for sale lewd, obscene, and indecent written matter, contrary to sec. 944.21 (1) (a), Stats., and was sentenced to not more than one year in the state prison. Execution was stayed and he was placed on probation for two years. Defendant appeals.

Originally arraigned before the Honorable HERBERT J. STEFFES in the muncipal court of Milwaukee county, defendant filed an affidavit of prejudice against Judge STEFFES and the case was transmitted to the circuit court. Defendant waived a jury trial and was tried before the Honorable ELMER W. ROLLER, circuit judge.

Defendant operates the Century Book Store in the city of Milwaukee. The state introduced into evidence 13 exhibits, each a magazine, which it is stipulated were in the possession of the defendant for sale at his store on September 16, 1959. Defendant testified he did all the ordering of new magazines for the store and although he did not read all the stories in the magazines, he did look at the pictures; that he was aware of all the magazines in his store on September 16, 1959, and that he had seen at least the covers of all of them and had paged through them. Of the 13 magazines in question the trial court held that four were obscene.

Further facts will be stated in the opinion.

For the appellant there were briefs by *Raskin, Zubrensky & Padden,* attorneys, and *Leonard S. Zubrensky* of counsel, all of Milwaukee, and oral argument by *Leonard S. Zubrensky.*

For the respondent the cause was argued by *Richard B. Surges,* assistant district attorney of Milwaukee county, and *William A. Platz,* assistant attorney general, with whom on the brief were *John W. Reynolds,* attorney general, and *William J. McCauley,* district attorney of Milwaukee county.

Martin, C. J. Sec. 944.21(1)(a), Stats., provides:

> "(1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than five years or both:
>
> "(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene, or indecent written matter, picture, sound recording, or film; . . ."

The constitutional provisions here involved are:

Wisconsin constitution, sec. 3, art. I:

> "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

Amendments to the United States constitution:

> Art. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

> Sec. 1, art. XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The test of obscenity which the trial court applied to the exhibits in this case is that enunciated in *Roth v. United States* (1957), 354 U.S. 476, 489, 77 Sup. Ct. 1304, 1 L. Ed. (2d) 1498 (argued and decided with *Alberts v. California*), as follows:

> "*. . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.* The *Hicklin* test [*Regina v. Hicklin* (1868), L. R. 3 Q. B. 360], judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity." (Emphasis supplied.)

In the *Roth Case* the question was whether the federal obscenity statute violates the free-speech amendment, and in that case conviction was by a jury. In the *Alberts Case* the question was whether the obscenity provisions of the California penal code invaded the freedoms of speech and press as incorporated in the protection of the Fourteenth amendment, and in that case conviction was by the court.

The United States supreme court held in the *Roth Case*, page 485, that "obscenity is not within the area of constitutionally protected speech or press," quoting from *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 571, 572, 62 Sup. Ct. 766, 86 L. Ed. 1031, as follows:

> " 'There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' "

The court rejected the earlier standard of obscenity which permitted material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons and adopted the test referred to above, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." It affirmed the convictions in both the *Roth* and *Alberts Cases* because in both the proper definition of obscenity was used and both followed the proper standard. It is noted that in the *Alberts Case* the trial judge indicated that as the trier of the facts he was judging each item as a whole as it would affect a normal person; and the United States supreme court approved the instructions given to the jury in the *Roth Case*, which included the following (p. 490):

> " 'The test in each case is the effect of the book, picture, or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine

its impact upon the average person in the community. The books, pictures, and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures, and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. . . .

"'In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is,' and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women, and children.'"

The United States supreme court recognized that terms used in obscenity statutes are not precise (pp. 491, 492):

"This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . The constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo*, 332 U.S. 1, 7, 8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' [Citing cases.]

> "In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."

Under these authorities, the words "lewd, obscene, or indecent" used in sec. 944.21(1)(a), Stats., are not unconstitutionally indefinite. We may agree, as appellant argues, that standards by which obscenity have been judged have changed through the years and such standards may vary as between individuals. It was in recognition of that fact that it was held in the *Roth Case* that the standard to be applied is that of the *average* person, applying *contemporary* community standards. If the dominant theme of the material taken as a whole, and considered by such standards, appeals to prurient interest, it is obscene.

In a note to the *Roth Case*, at page 487, the definition of the A. L. I., Model Penal Code, sec. 207.10(2) (Tentative Draft No. 6, 1957) is stated as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

Appellant argues, citing various psychiatric texts, that there is no relationship between the reading of erotic material and dangerous social behavior. This aspect of the subject is beside the point in deciding the case. As observed by Mr. Justice HARLAN in his concurring opinion in the *Roth Case*—calling attention to the fact that the causal connection between such reading material and

crime or delinquency is a matter on which there are opposing schools of scientific thought—it is not for the court to decide that question. That function is legislative, and the very fact that there is division of opinion on the subject is good reason to respect the choice made by the legislature.

In this case the trial court adopted and applied to the exhibits the standard set forth in the *Roth Case* as the test of obscenity. The court was the finder of the fact, appellant having waived trial by jury. Thus, it was the "exclusive judge of what the common conscience of the community is . . . as a whole."

The court found that the first five exhibits were not obscene material. They are nudist magazines containing photographs of naked men, women, and children, all taken out of doors and in casual poses. As observed by the trial court, the individuals in the photographs are not placed in unusual or unnatural close proximity; there are no attitudes of sensuality and no emphasis on genital parts.

It further found that Exhibits 6 and 7, magazines of posed nudes advertised of interest to photographers and artists, were not obscene.

It found Exhibit 10 obscene. That exhibit contains numerous photographs of nudes and seminudes in provocative poses, a great many of them on beds and davenports. These pictures, in the words of the trial court, provide an appropriate setting for two sordid stories. One of these stories describes in highly erotic detail the experiences of a man with a young nymphomaniac and ends with her date with an android, the implication being obvious. The trial court stated, "This story is sor-

did, indecent, lewd, and in connection with the mechanical contrivance reaches toward depravity." The other story narrates in sensually suggestive description the weekend when a boy of eighteen years "becomes a man" through illicit sex acts with his sister's girl friend. As to this the trial court stated, "people of this community have different standards of manhood for young boys." These stories, together with the photographs already mentioned, were held to be obscene, as "dirt for dirt's sake." Even the advertisements are unnecessarily beyond the bounds of decency. It is not necessary to go into more detail here; further reference will be left to the cases and briefs.

Exhibits 8, 9, and 12 were likewise held obscene. These are magazines containing photographs of the same description as Exhibit 10.

The trial court stated in its decision:

> "The dominant theme of each item of material noted, taken as a whole, to the average person, applying community standards, appeals to prurient interest within the meaning of the rule of the *Roth Case* and is obscene within the meaning of sec. 944.21 (1)(a), Stats., of the Criminal Code of this state."

Appellant calls attention to several cases involving obscenity convictions since the *Roth Case,* where certiorari was granted by the United States supreme court and the judgments reversed without opinion, citing the *Roth Case. Sunshine Book Co. v. Summerfield* (1958), 355 U.S. 372, 78 Sup. Ct. 365, 2 L. Ed. (2d) 352; *One, Inc., v. Olesen* (1958), 355 U.S. 371, 78 Sup. Ct. 364, 2 L. Ed. (2d) 352; *Times Film Corp. v. Chicago* (1957), 355 U.S. 35, 78 Sup. Ct. 115, 2 L. Ed. (2d) 72; *Mounce v. United States* (1957), 355 U.S. 180, 78 Sup. Ct. 267, 2 L. Ed.

(2d) 187. It is argued that the effect of these decisions is to change the standard enunciated in the *Roth Case*. Analysis of the cases discloses that the tests of obscenity there applied were not the test set forth and approved in the *Roth Case*. It is apparent that the United States supreme court, in citing the *Roth Case* in each such reversal, has insisted that the test to be applied is that approved in the *Roth Case*.

Appellant contends that he cannot be found guilty of possessing obscene literature if he does not have knowledge of the contents, citing *Smith v. California* (1959), 361 U.S. 147, 80 Sup. Ct. 215, 4 L. Ed. (2d) 205. He testified that he did not read the text or stories in any of the exhibits. The ordinance involved in the *Smith Case*, construed to eliminate the requirement of scienter, was held invalid (p. 153):

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfils its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

In the majority opinion Mr. Justice BRENNAN further stated (p. 154):

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now

since the law viewed itself as impotent to explore the actual state of a man's mind."

And Mr. Justice FRANKFURTER, in his concurring opinion, stated (pp. 161, 164):

"The court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity. Obviously the court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. . . .

"Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the state to deal with obscenity. Out of regard for the state's interest, the court suggests an unguiding, vague standard for establishing 'awareness' by the bookseller of the contents of a challenged book in contradiction of his disclaimer of knowledge of its contents. A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book. As a practical matter therefore the exercise of the constitutional right of a state to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of nonobscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally."

Appellant testified he had the exhibits in his possession for sale; that he had looked at the covers and paged

through the magazines, looking at the pictures, but he did not read the text or stories. It was the trial court's opinion that even the most-cursory examination of Exhibit 8 would make him aware of its appeal to the prurient interest, and we agree.

It is argued by appellant that the test of "clear and present danger" is applicable to the law of obscenity, relying on language in the dissent of Mr. Justice DOUGLAS in the *Roth Case*. The other cases referred to were all decided before the decision in the *Roth Case*. As Mr. Justice BRENNAN stated in the majority opinion (p. 486), in the light of the holding that obscenity is not protected speech, it is unnecessary for the courts to consider the issues behind the phrase "clear and present danger:" "Certainly no one would contend that obscene speech . . . may be punished only upon a showing of such circumstances."

By the Court.—Judgment affirmed.

APPENDIX D

DECISION BY CIRCUIT COURT, MILWAUKEE COUNTY

State of Wisconsin vs. Joseph Chobot

The information charges that on the 16th day of September, 1959, at the County of Milwaukee, State of Wisconsin, the defendant, Joseph Chobot, did feloniously have in his possession for sale, lewd, obscene and indecent matter, contrary to Section 944.21(1)(a) of the statutes.

Defendant entered a plea of not guilty to the charge of the information and waived a trial by jury.

Section 944.21(1)(a), Stats., provides as follows:

> "*Lewd, obscene or indecent matter, pictures and performances.* (1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:
>
> (a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or"

The *Roth* and *Alberts* cases, (1957) 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. (2d) 1498, are the two latest cases involving prosecutions for violations of obscenity statutes. True several other cases have reached the United States Supreme Court since the decision in *Roth* and *Alberts* but they were determined, certiorari being granted, summarily without opinion on the authority of that decision. For that reason it is important that reference be made to what was determined in *Roth* and *Alberts*.

1. In the *Alberts* case the court held that a statute of the State of California, similar to the one under which this defendant is charged, declaring it to be a misdemeanor to sell or keep for sale any obscene or indecent publication does not invade the freedom of speech and press as protected from state action by the Fourteenth Amendment to the United States Constitution.

2. Obscenity is not within the area of the constitutional protection of freedom of speech and press.

In this connection the court said:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of guaranties, unless excludable because they encroach upon the

limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572, 86 L. Ed. 1031, 1035, 62 S. Ct. 766:

> '. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* . . . (Emphasis added.)'"

But sex and obscenity, the court noted, are not synonymous and only material which deals with sex in a manner appealing to prurient interest is obscene. The liberty to discuss matters of public concern without previous restraint or fear of subsequent punishment is included within the constitutional guarantees of freedom of speech and press. *Thornhill v. State of Alabama*, 310 U.S. 88, 101-102, 60 S. Ct. 736, 744, 84 L. Ed. 1093. And sex is such a matter of public concern. With respect to this right of freedom of discussion the court said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the

watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The so-called Hicklin test by which the courts have judged obscenity by the effect of isolated parts of the indicted material upon the most susceptible persons has been rejected as unconstitutionally restrictive. The constitutional guarantees are not violated because convictions may be had without proof that the material will perceptibly create a clear and present danger of antisocial conduct.

3. The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Defendant here points to respectable scientific authority which holds that there is no causal relationship between the reading of obscene material and antisocial conduct. While that was not an issue in the *Alberts Case*, Mr. Justice HARLAN, in a concurring opinion in that case, gave a short answer to the same contention: "Others disagree." He added: "Clearly it is not our function to decide this question. That function belongs to the state legislature. . . . Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state con-

cern, this Court should be slow to interfere with state legislation calculated to protect that morality. . . ."

That men may differ in their conclusions as to the same material is not an objection to the statutory definition. "That is one of the consequences we accept under our jury system." (See footnote 30 to *Roth Case*.) This is true of the marginal cases in which *Roth* states "it is difficult to determine the side of the line on which a particular fact situation falls."

Further particular reference is made to the following text of the concurring opinion of Justice HARLAN in the *Alberts Case*:

> "In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. See Jackson, J., dissenting in Beauharnais v. Illinois, 343 U.S. 250, 287, 96 L. Ed. 919, 944, 72 S. Ct. 725. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of 'ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 324, 325, 82 L. Ed 288, 291, 292, 58 S. Ct. 149."

These fundamental principles have been reviewed to guide the court in the approach to the vital question of whether the material here is in fact obscene.

Obscene material is material having a tendency to excite lustful thoughts. *Roth v. United States*, supra. See

also the definition of prurient, Webster's New International Dictionary (Unabridged, 2d ed. 1949).

See also further footnotes under 20 of the majority decision in the *Roth Case,* in particular the court's reference to *Mutual Film Corp. v. Industrial Comm.,* 236 U.S. 230, 242, 35 S. Ct. 387, 390, 59 L. Ed. 552, and the text herewith quoted:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, section 207.10(2) (Tent Draft No. 6, 1957) viz.:
>
> '. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .'"

See also *Sutton v. McConnell,* 46 Wis. 269, 50 N.W. 414. The words "lewd, obscene or indecent" as used in the criminal code are not unconstitutionally indefinite. *Alberts v. United States,* supra.

The court has viewed and read the material here involved. Exhibits Nos. 1, 2, 3, 4 and 5 are nudist magazines, ostensibly propaganda for the nudist cult. They contain photographs of men, women and children, presumably members of the nudist movement, all stark naked. They are full view pictures, all taken out of doors, very apparently in the background of nudist camps and meeting places. The poses are casual, there is no emphasis on the genital parts or region, the individuals are not placed in unusual or unnatural close proximity and there are no attitudes of sensuality. Nudity it not obscenity. Applying the test of the *Roth Case,* the court is satisfied that the material identified as Exhibits 1, 2, 3, 4 and 5 is not obscene.

The same finding is made with respect to Exhibits 6 and 7, which are magazines of posed nudes advertised of interest to photographers and artists.

Exhibit No. 10 is a magazine containing numerous photographs of nudes and seminudes; not a few are shown reclined on beds and sofas.

Amid this appropriate setting are two sordid stories. One bears the title, "Twitch." "Twitch" is a story about Sugar Sweet, a young strip tease dancer whose physical charms are vividly described in the story. Among her artistic talents, Sugar possesses the ability to twitch her hips in rhythm with the beat of the music, a talent which she employed to great sensual gratification in the sex act with Phil which comes later in the story. Sugar has a price: $20.00 an hour. Phil pays Sugar $50.00 for two and a half hours of her time. The events leading up to the sex act are excitingly descriptive. For example: "A silken leg insinuated itself between his own. Phil could hear pagan tom-toms heralding a fascinating sequence of coming events — tom-toms whose insistent beat was echoed in the rhythmic tremors that danced from her legs to his. . . . The leg was removed gently and a rounded knee did calisthenics up and down Phil's thigh. He squirmed." The story tells how Phil assists in undressing Sugar, how "almost reverently he helped her remove her hose and garter belt." Then comes the sex act throughout which "her hips kept up their insistent twitching. There was always movement, no matter how slight and it made her whole body ripple." This continues until Phil, completely exhausted, cries, "Don't." When he gets out of bed, with difficulty, Sugar reminds him that he still has ten minutes coming to him. According to the story it took Phil a week to recover his strength

after his bout in bed with Sugar. But that isn't the end. Sometime later when Phil called Sugar for another date, she advises him that she has a previous date. It turns out that her date is with a "Mr. Adams," an android—a robot—a mechanical man who, on the obvious suggestion won't get tired in the sexual act with Sugar.

This story is sordid, indecent, lewd and in connection with the mechanical contrivance reaches toward depravity. Applying the test of the *Roth Case,* this court concludes without question that it is obscene. As a federal judge once said of obscene material, and this seems to be an apt definition, it is "dirt for dirt's sake."

But Exhibit 10 is a double feature in obscenity. A second story entitled "Higher Education" is about a boy, a good boy, a virgin, 18 years of age, who became a man overnight when he had sexual intercourse with his sister's girl friend in the family home while his parents were away visiting relatives. The details of the early evening love making, prior to the midnight adventure in bed are vividly described and are sensually suggestive. The young man tells, among other things, about when he closed his arms around the girl, she set her hands to roaming madly up and down his body. The sole purpose of the story is to stimulate and incite sexual feeling in the reader. Applying the standard of the *Roth Case,* this material is unquestionably obscene.

It is true that our nation has grown strong through the dissemination of ideas free and unhampered by censorship but what idea does a story such as this convey which entitles it to constitutional protection? Can it be said that it has some value in setting up a standard of manhood for 18 year old boys? After the fierce passion in the bedroom, our 18 year old hero says, "From a boy I

became a man." I am certain that people of this community have different standards of manhood for their young boys. It should be remembered that the hero of this story is an 18 year old youth. Hence, the story has an appeal to readers of that age. Reading something like this in a publication, which must tend to give it some authority, can, in my opinion, undue a lifetime of parental training. Neither of these stories have any redeeming quality whatsoever. Conceding *arguendo*, the authority of erotic realism of Drs. Eberhard and Kronhausen, I cannot see that they are erotic realism. They have no other redeeming social value and are only "dirt for dirt's sake."

Exhibits 8, 9 and 12 contain photographs of nudes interspersed with partially and scantily clothed models, some reclining in provocative poses.

The dominant theme of each item of material noted, taken as a whole, to the average person, applying community standards, appeals to prurient interest within the meaning of the rule of the *Roth Case* and is obscene within the meaning of section 944.21(1)(a), Stats., of the Criminal Code of this State.

Evidence of sales of like material as indicative of contemporary community standards bears no weight. Not only is it insignificant but the area in the main goes beyond the community with which we are here concerned. Defendant points out in his brief that classical works containing similar material have been held not obscene. Aside from the fact that the material here is far from classical literature, the short answer is that applying the test under the statute, it is obscene.

The court's attention is directed to four *per curiam* reversals of obscenity by the Supreme Court since the

Roth Case, in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. (2d) 352; *One, Inc. v. Olesen*, 355 U.S. 372, 78 S. Ct. 364, 2 L. Ed. (2d) 352; *Times Film Corp. v. Chicago*, 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. (2d) 72; *Mounce v. United States*, 355 U.S. 180, 78 S. Ct. 267, 2 L. Ed. (2d) 187. The *per curiam* decisions are far from conclusive on the direct question of obscenity. The court is of the opinion that the position of the State is correct, that the tests of obscenity of the *Roth Case* were not applied in those cases.

Glanzman v. Christenberry, 175 Fed. Supp. 485, 487, involving graphic material, was decided after the *Roth Case*. There the court considered *Sunshine Book Co. v. Summerfield* and had this to say:

> "(4, 5) Plaintiff in this action relies upon the decision of the United States Supreme Court in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. ed. 2d, 352 which reversed a decision of the Court of Appeals for the District of Columbia, 101 U.S. App. D. C. 358, 249 F. 2d 114, upholding a ruling of non-mailability by the Post Office Department. The reversal by the Supreme Court was without opinion but proceeded upon the citation of *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. That case at page 488 of 354 U.S. at p. 1311, of 77 S. Ct. stated, 'It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Counsel for plaintiff has submitted the material which the Supreme Court thus held to be protected by the Constitution in the Sunshine Book case. The only similarity between the material in the Sunshine Book case and that here involved is that each features nakedness. The Sunshine Book Company publications were devoted to the cult of nudism and the

> pictures left nothing to the imagination as far as the human body was concerned. Yet the Supreme Court held that they were not obscene, presumably because they did not appeal to prurient interest. Here, however, there is hardly a picture which is not provocative of the sexual instinct. The pictures where the models are partially clothed, as for instance with a pair of stockings or gloves, are still more provocative than those of complete nudity. I find that most of them treat sex in a manner appealing to prurient interest within the meaning of the rule of the Roth case and are obscene within the meaning of section 1461."

Within the past three weeks the United States District Court for the United States District Court for the Northern District of Illinois, Eastern Division, held a scene in a movie film suggestive of a passionate sex act, obscene under the application of the test of the *Roth Case*.

Smith v. California, 4 L. Ed. 205, 211, 216, has no application here. It involved the constitutionality of an ordinance which dispensed entirely with the element of scienter. Section 944.21 (1) (a) does not eliminate the element of scienter. The *Smith Case* does not disarm the law and compel surrender. Note what the court said:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind."

Mr. Justice FRANKFURTER, in his concurring decision, added:

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the court suggests an unguiding, vague standard for establishing 'awareness' by the bookseller of the contents of a challenged book in contradiction of disclaimer of knowledge of its contents."

The defendant here testified that he looked at the pictures in the material which was in his possession. He had the material in his possession for sale. The most cursory examination of the material identified in this record as Exhibit No. 8 alone, would make the defendant aware of its appeal to pruriency.

The court is satisfied of the defendant's guilt of the offense charged beyond a reasonable doubt.

Respectfully submitted,

ELMER W. ROLLER,
Circuit Judge.

Dated: April 27, 1960.

APPENDIX E

Order Denying Motion for Rehearing

STATE OF WISCONSIN,
Respondent,

v.

JOSEPH CHOBOT,
Appellant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered and adjudged by this Court, that the said motion be, and the same is hereby, denied without costs.

APPENDIX F

State of New York
Court of Appeals

No. 43

The People &c.,
Appellant,

vs.

Richmond County News, Inc.,
Respondent

OPINION

Unrevised and Uncorrected. Not for Publication.

FULD, J:

Charged by an information with selling and distributing an allegedly obscene magazine in violation of section 1141 of the Penal Law, the defendant Richmond County

News, Inc., was convicted in the Court of Special Sessions of the City of New York. Upon appeal, the conviction was reversed and the information dismissed; although the Appellate Division agreed with the trial court that the magazine was obscene, it decided that the proof failed to establish that the defendant had knowledge of the magazine's obscene character.

We believe that the reversal was required, but for a different reason. It is our view that the magazine is not obscene and, accordingly, we do not reach the question as to the kind of knowledge required for a conviction under this statute or the question whether the facts here shown would justify a finding that such knowledge existed.

The defendant is a wholesaler of magazines, paper-covered books and newspapers. Among the 700-odd items carried by the defendant, which its receives from national distributors, was the magazine "Gent", and it was the sale and distribution of its April 1957 issue which occasioned the prosecution under section 1141.

From all appearances, "Gent" is similar in purpose to numerous other magazines displayed on newsstands, whose photocovers loudly proclaim their dedication to coarse sexual titillation. The contents, like the cover, exhibit the same attempt to pander to and commercialize upon man's taste for the bawdy and the ribald behind a bare disguise of aesthetic respectability. Thus, together with short stories of apparent literary merit, reprinted with permission from standard editions of the author's works, which are inoffensive under any standard of sexual sensitivity, there appear the staples of this form of sexual provocation. These staples include "pictorial essays" which are tawdry attempts to satisfy

mild voyeurism by photographing nude and partially dressed women in "artistic poses", salacious cartoons and short stories of sexual seduction devoted to little other purpose than sexual stimulation.

The courts below have characterized the magazine as "obscene", but whether that finding is justified requires us—despite contrary intimations in some of our decisions (see *People v. Pesky*, 254 N.Y. 373; *People v. Muller*, 96 N.Y. 408, 410)—to make an independent constitutional appraisal of the magazine. This court, as State's highest tribunal, no less than the United States Supreme Court, cannot escape its responsibility in this area "by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." (*Roth v. United States*, 354 U.S. 476, 497-498, Harlan, J., concurring; see, also, *Feiner v. New York*, 340 U.S. 315, 316; *Watts v. Indiana*, 333 U.S. 49, 51; *Norris v. Alabama*, 294 U.S. 587-589-590; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 114-120.)

The question whether a book or other publication is obscene involves a difficult constitutional issue; it involves not a simple question of fact, but a mixed question of fact and constitutional law, an appraisal of a publication and its contents against the requirements embodied in both State and Federal Constitutions (N.Y. Const., art. 1, § 8; U.S. Const., 1st and 14th Amdts.). For an appellate court to rely upon and be bound by the opinion of the trier of the facts as to the obscenity of a

publication is to abdicate its role as an arbiter of constitutional issues. As the Supreme Court concluded in *Feiner v. New York,* (340 U.S. 315, 316, *supra*), "where First Amendment rights are drawn in question, we of course make an independent examination of the evidence to ascertain whether the right has been violated."

It is settled doctrine that a state may constitutionally convict those who publish, sell or keep for sale publications "incontestably found to be obscene" without offending against the guarantees of the First Amendment. (*Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 440; *Roth v. United States,* 354 U.S. 476, 481, *supra; Alberts v. California,* 354 U.S. 476.) But "the existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power". (*Smith v. California,* 361 U.S. 147, 155; see, also, *Roth v. United States,* 354 U.S. 476, 497-498, *supra,* Harlan, J., concurring.) Although the Constitution does not, therefore, stand as a barrier against legislation making obscenity criminal, it does stand as a limitation on such legislation of such a sort as to compel us to construe it strictly. The danger of a violation of cherished First Amendment rights necessitates narrow construction; we may open "the door barring federal and state intrusion into this area * * * only the slightest crack necessary". (*Roth v. United States,* 354 U.S. 476, 488, *supra.*)

Whether we focus upon the historical development of social and judicial attitudes towards writings or art work dealing with sex, or whether we view the differences on this score among various groups within our contemporary society, we cannot help but be impressed by the

extraordinary diversity which is manifest.[1] Under these circumstances, we must interpret our statute to include only those prohibitions which find the widest acceptance, and which reflect the most universal moral sensibilities. "The law," said Judge Cardozo, "will not hold the crowd to the morality of saints and seers" (*Paradoxes of Legal Science*, p. 37); nor, we would add, will it hold the crowd to the literary or artistic fashion of the hour.

An interest in upholding the legislation also demands that its impact be limited to its legitimate sphere, so that it will not be held applicable to the advocacy of ideas. The urging of doctrine, for instance, even if mischief would result were it followed, is within the protection of the Constitution. (See *Yates v. United States*, 354 U.S. 298, 318, 322; *Dennis v. United States*, 341 U.S. 494, 512-513.) And the mere fact that adulterous or other sexually immoral relationships are portrayed approvingly cannot serve as a reason for declaring a work obscene without running afoul of the First Amendment. (See *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688.) The Constitution protects "advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax" (*Kingsley Pictures Corp. v. Regents*, 360 U.S., at p. 689).

The same protection applies even if the material which is subject to prohibition is a form of entertainment, rather than an exposition of ideas, and even if we conclude that

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[1]See Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40; Blanchard, *The Right to Read* (1955), pp. 138-167; Ernst and Seagle, *To the Pure* (1928), ch. XIII; Larrabee, The Cultural Context of Sex Censorship, 20 Law and Contemporary Problems, 672, 676-681; Weeks, *The Trade of Writing* (1935), pp. 126-147; Cairns, Freedom of Expression in Literature, 200 The Annals 76, 76-84; Mencken, Prejudices, Fifth Series (1926), pp. 15-21.

it is lacking in all social value. (See *Winters v. New York*, 333 U.S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153, 158.) As the Supreme Court declared in the *Winters* case (333 U.S., at p. 510), "What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

It is noteworthy that, despite the reams of materials on the effect of books, magazines and other media of expression on sexual conduct,[2] "there is very little scientific evidence" on the subject. (St. John-Stevas, *Obscenity in the Law* [1956], p. 196; see, also, *Brown v. Kingsley Books*, 1 N Y 2d 177, 181, fn. 3; *United States v. Roth*, 237 F. 2d 796, 812-817, *per* Frank, J., concurring, affd. 354 U.S. 476.) Indeed, two authoritative writers in the field have concluded that, "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling

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[2]See, e.g., Bell, *Youth Tell Their Story* (1938), pp. 40-42; Ernst and Seagle, *To the Pure* (1928), Ch. XII; Gelhorn, *Individual Freedom and Governmental Restraints* (1956), pp. 60-67; Jahoda and Staff of Research Center for Human Relations, New York University (1954), The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate; Mead, Sex and Censorship in Contemporary Society, *New World Writing, Third Mentor Selection* (1953); Scott, *Into Whose Hands* (1945), p. 20; Wertham, *Seduction of the Innocent* (1953); Hearings Before the Select Committee on Current Pornographic Materials of the House, 82d Cong., 2d Sess. (1952); Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955); Report of the N.Y. State Joint Leglislative Committee to Study the Publication of Comics, N.Y. Leg. Doc. #37, 1955.

out as a factor for study the effect of sex literature upon sexual behavior". (Lockhart and McClure, Obscenity and the Courts, 20 Law and Contemporary Problems 587, 595; see, also, American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10, p. 44.) Some commentators have gone even further and suggested that "for an undetermined number of individuals, the writing or reading of obscenity may be a substitute for rather than a stimulus to physical sexuality." (American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10, p. 45.) The suggestion in these writings is that there is no causal connection between what is regarded as "obscene" and antisocial conduct of a sexual nature.

Other writers, expressing a somewhat different view, argue that the obscenity laws themselves, in forbidding the publication, sale and distribution of obscenity, can have little effect on sexual deviation and crime. Some studies seem to suggest that "erotic responses", whether normal or abnormal, are as frequently evoked by objects and literature which are not, in the conventional sense, sexual as by the conventional sexual stimuli. (See Kinsey, et al., *Sexual Behavior in the Human Female* [1953], pp. 669-670; *Kinsey*, et al., *Sexual Behavior in the Human Male* [1948], p. 510.) And a survey made some years ago by the New York City Bureau of Social Hygiene showed that out of 409 college women who responded to the question inquiring what they found most sexually stimulating, 18 said "pictures", 40 said "drama", 95 said "books", and 218 simply said "man". (See Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73.)

The argument on this score was incomparably stated some centuries ago by Milton in his immortal Areo-

pagitica: "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin * * * Though ye take from a covetous man all his treasure, he has yet one jewel left: ye cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make them chaste that came not thither so."

In alluding to these commentaries and studies which reflect upon the wisdom and validity of obscenity laws, we do not, of course, mean to approve their conclusions or to suggest that they provide a basis for overturning the statute before us. Even if all these materials were in agreement—and, as we have seen, they are not—this court alone would still have the sole authority and duty of performing the judicial function involved in the interpretation and application of a state statute. However, although the views of expert laymen cannot possibly impeach the legal validity of the statute, their writings do reflect responsible views in the social community which any forward-looking court ought to take into account.

The broader the prohibitions we read into our statute, the more unlikely it is that these prohibitions are reasonably related to the legitimate ends which the legislation seeks to serve. Thus, the constitutional background of the legislation, the inherent nature of the subject of regulation and the available knowledge concerning the possible effects of such legal regulation all point to and necessitate a very limited definition of the statutory prohibition of obscenity.

Turning now to the problem of definition itself, we note, to begin with, that, until very recently, the test of obscenity in this State was that laid down in *Regina v.*

Hicklin ([1868] L.R. 3 A.B. 360) and stated by this court to be "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it". (*People v. Muller*, 96 N.Y. 408, 411, *supra;* see, also, *People v. Doubleday & Co.*, 297 N.Y. 687, affd. 335 U.S. 848.) This test was justly criticized, however, on two different grounds—the first, that, as applied, a book might be condemned on the basis of isolated passages in it rather than because of its "dominant effect" (*United States v. One Book Called "Ulysses"*, 72 F. 2d 705, 708, affg. 5 F. Supp. 182, 185) and the second, that it "reduce[d] our treatment of sex to the standard of a child's library". (*United States v. Kennerly*, 209 Fed. 119, 121.)

Not until 1956, however, did the Supreme Court declare impermissible and unconstitutional a standard of obscenity which rested on the tendency of the objectionable material to corrupt the morals of the young or immature. (See *Butler v. Michigan*, 352 U.S. 380, 382-383; see, also, *Brown v. Kingsley Books*, 1 N Y 2d 177, 188-189, *supra; Mtr. of Excelsior Pict. Corp. v. Regents*, 3 N Y 2d 237, 241-242.) The consequence of such a standard, wrote the court in the *Butler* case, "is to reduce the adult population * * * to reading only what is fit for children" and it must fall on this account because "it is not reasonably restricted to the evil with which it is said to deal" (352 U.S., at p. 383). In *Roth v. United States* (354 U.S. 476, *supra*), the Supreme Court went further and repudiated both of the objectionable aspects of the *Hicklin* rule, declaring (p. 489): "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must

be rejected as unconstitutionally restrictive of the freedoms of speech and press."

It is apparent, however, that, although the *Butler* and *Roth* cases destroy the *Hicklin* rule, they do not lay down a test of obscenity binding on our interpretation of this State's obscenity statute. (See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 55.) In the *Butler* case (352 U.S. 380, *supra*), the court merely condemned the statute before it without suggesting a constitutionally sanctioned alternative. In the *Roth* case (354 U.S. 476, *supra*), the court did say that "obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487), and that the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (p. 489). These statements, however, can only indicate the broad boundaries of any permissible definition of obscenity under the United States Constitution; they do not pretend to, and cannot, give specific content to the meaning of "obscene" as it appears in our statute.

As we wrote in *Brown v. Kingsley Books* (1 N Y 2d 177, 181-182, *supra*), the concept of obscenity is "imprecise", its "'vague subject-matter' being largely 'left to the gradual development of general notions about what is decent'". Accordingly, the problem involved in laying down a standard is to find "the present critical point in the compromise between candor and shame at which the community [has] arrived." (*United States v. Kennerly*, 209 Fed. 119, 121, *supra*.) To be sure, there are some in the community who regard any realistic portrayal of sexuality, any form of erotic realism, as an insupportable threat to the social order. And there are others who view

any intrusion of the State's power in this area as unnecessary and improper. The "critical point in the compromise" lies between these extremes. "All that we can say is that the line [must] be higher than the lowest level of moral principle and practice, and lower than the highest". (Cardozo, *Paradoxes of Legal Science*, p. 37.)

Mindful of the constitutional necessity to open the door barring state intrusion into this area "only the slighest crack necessary" (*Roth v. United States*, 354 U.S. 476, 488, *supra*), and desirous of erecting a standard which embodies the most universal moral sensibilities and may be applied objectively, we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed "hard-core" pornography. The mere undemonstrated possiblity of harm to the community from realistic accounts of normal sexuality is not of sufficient moment to warrant the exercise of the public force in their suppression. And this is true whether the narratives concerned may be said to have artistic or scientific justification or whether they lack anything of "any possible value to society". (*Winters v. New York*, 333 U.S. 507, 510, *supra*; see, also, *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 153, 158, *supra*.)

As the Supreme Court observed in the *Roth* case (354 U.S. 476, 486, *supra*), "sex and obscenity are not synonymous." (See, also, *Mounce v. United States*, 355 U.S. 180, revg. 247 F. 2d 148; *One, Inc. v. Olesen*, 355 U.S. 371, revg. 241 F. 2d 772; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, revg. 249 F. 2d 114.) Under our statute, section 1141 of the Penal Law, the test of the obscene, of the pornographic, is not in the tendency or appeal of the material, but rather in its content objectively appraised. (See Lockhart and McClure, Censor-

ship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 58-68.) It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable "by the insult it offers, invariably, to sex and to the human spirit" (D. H. Lawrence, *Pornography and Obscenity* [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, it is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, "a debauchery of the sexual faculty". (Murray, Literature, Censorship, 14 Books on Trial 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 65.)

Applying this standard to the issue of the magazine before us, it is plain that it does not fall within the proscribed area. This is so because no one of its stories or pictures is obscene within the meaning of section 1141 of the Penal Law. If, though, any single item, considered as a whole, were pornographic, the circumstance that it was included in a collection otherwise without taint would not save it from criminal prosecution. The fact is, however, that, while the magazine contains many stories or pictures which are aesthetically tasteless and without any redeeming social worth, none of them is pornographic. Numerous pictures and cartoons of nude or semi-nude women and numerous descriptions and depictions of sexual arousal and satisfaction are to be found in "Gent" but it contains nothing which smacks of sick and blatantly perverse sexuality. Whether or not, therefore, the defendant had scienter, we may not say that

the sale of the magazine constituted a violation of our obscenity law.

Were we to judge the magazine before us in terms of our personal views of its social value, of its moral and aesthetic worth, we would condemn it out of hand for its vulgarity no less than for its banality. Basic principles of jurisprudence, however, command us to put to one side all personal predilections, including our distaste for commercial exploitation of sensuality. It is our conclusion that the magazine, appraised as objectively as is possible in the light of First Amendment concepts, may not be adjudged obscene without impairing the vital social interest in freedom of expression.

The order appealed from should be affirmed.

DESMOND, CH. J. (concurring for affirmance):

I find in this record satisfactory proof that defendant knew the character and content of the magazine which it sold and which is alleged to be obscene. But the larger question is: was this periodical obscene in the sense that the law uses that ancient adjective, which over the centuries has had so many shades of meaning? In other words, does the magazine come within the prohibition of section 1141 of the Penal Law and, if so, is such a prohibition valid within the "obscenity" exception to the First Amendment's freedom of speech (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 571, 572)?

Not only is the meaning and application of the term "obscene" doubtful and controversial, but from the writings of the canon law specialists of old to the modern opinions of the United States Supreme Court the one point of universal agreement is that precise definition is impossible. This is one of the law questions where, as

Samuel Johnson observed: "Definition is hazardous", and yet a workable test is available and accepted. The intrinsic nature, tendency and bent of the work determines whether it is to be banned or its vendor punished. An eminent moral theologian explains, quite consistently with the controlling American decisions: "For a book to be prohibited it is necessary that from its whole tenor the author's intention is evident of teaching the reader about sins of impurity and arousing him to libidinousness" (Noldin, De Preceptis Dei et Ecclesiae, p. 658). St. John-Stevas, one of the soundest and sanest of today's writers on the law of obscenity, says that: "A pornographic book * * * is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac" (Obscenity and the Law, p. 2; cf. *Roth v. United States,* 354 U. S. 476, 486, 487). The identical thought is in Judge Woolsey's famed *Ulysses* opinion (*United States v. Book Called Ulysses,* 72 F. 2d 705, 707) and in Justice Brennan's famous phrase: "dominant theme of the material taken as a whole appeals to prurient interest" (*Roth v. United States, supra,* p. 489). The inquiry for the court, therefore, is whether the publication is so entirely obscene as to amount to "hardcore pornography" (not necessarily dealing with deviate sex relations since while there is a pornography of perversion, "pornography" is not limited to the depiction of unnatural acts).

And who is to decide what is the dominant theme of a particular book or picture or play? The Supreme Court has given us a sufficient answer: "the average person, applying contemporary community standards" (*Roth v. United States,* 354 U. S. 476, 489, 490, *supra*).

Grounded in logic, good morals and precedent is that part of the rule which looks to the "dominant theme"

(see *United States v. Limehouse*, 285 U. S. 424; *Kingsley Books, Inc., v. Brown*, 354 U. S. 436; *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 698; *Matter of Excelsior Pictures Corp. v. Regents*, 3 N Y 2d 237, 242). The other part of the rule, which takes into account contemporary community standards is historically sound, also. From the earliest records of our civilization we know that pornographic writings and pictures have been always in circulation and that from the days of ancient Greece and Rome through the period of English ecclesiastical court jurisdiction and common-law times until the present there have been many rises and falls, sudden or gradual, in the levels of community acceptance of sex-concerned books, illustrations and plays. Each change has in turn affected the contemporary law as to obscenity.

Applying to the two-element test leaves one at least in reasonble doubt as to whether this magazine can fairly be called "pornographic" using that term as describing the extreme form of gross and all-intentioned sexuality which American statutes and courts may constitutionally punish as criminal. This collection of sexy fiction and illustrations has little of literary merit or artistry and yet it is not in the First Amendment sense filthy or disgusting or deliberately corruptive or offensive to common decency under prevailing standards of taste. Virtuous adults will reject it (as all of us Judges would were we not restrained by the *Roth-Alberts* legal test). Adolescents may be hurt by it. But our prepossessions are not the law and the reactions of children are not valid tests (*Roth v. United States*, 354 U. S. 476, 489, 490, *supra*).

Law in a pluralist society does not regulate literary standards or give expression to the loftiest virtues. Civil court decisions in such cases must be prudential, must

be acts of practical judgment in the social order of our time and place. "Human law cannot prohibit everything which the Natural law prohibits" (St. Thomas Aquinas, 700 years ago, in Summa Theologica, I-II, q. 96, art. 2, ad. 3) but must take full measure of human nature and current traditions. We follow the best ancient and modern legal thought and obey the spirit of our national charter when we interpret strictly—that is, liberally in favor of freedom—laws which restrict the right of free speech (Canon Law, Canon 19; *Matter of Excelsior Pictures Corp. v. Regents,* 3 N Y 2d 237, 246 *supra*).

The order should be affirmed.

FROESSEL, J. (dissenting):

For well nigh a century (L. 1868, ch. 430, Penal Code, L. 1881, ch. 676, § 317; Penal Law, § 1141), our Legislature has declared the public policy of this State with respect to the age-old problem of obscenity. The common judgment that obscenity should be restrained is also reflected in the international Agreement for the Suppression of the Circulation of Obscene Publications entered into by more than 50 countries (37 Stat. 1511; Treaties in Force, 209; U. S. Dept. State, Oct. 31, 1956); in the obscenity law of our 48 States (Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary pursuant to Senate Res. 62, 84th Congress, 1st Session [May 24, 1955]); and in the score of obscenity laws enacted by Congress since 1842. (*Roth v. United States,* together with *Alberts v. California,* 354 U. S. 476, 485.)

It is our duty to enforce that public policy in the light of developing constitutional standards, rather than the views expressed in selected articles, though informing

and well intentioned, which would justify or acquiesce in the alleged necessity or allowing the distribution of the kind of material complained of in this case. The principal question before us is whether "Gent", the magazine in evidence, is obscene under our statute.

The Supreme Court of the United States, in *Roth v. United States,* 354 U.S. 476, crystallized the current standard or test for judging obscenity. It recognized, as do we, that "sex and obscenity are not synonymous". It held, as it had previously indicated in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572, that "obscenity is not within the area of constitutionally protected speech and press". "Obscene material," the Court said, "is material which deals with sex in a manner appealing to prurient interest", which is defined as "material having a tendency to excite lustful thoughts" (*Roth v. United States, supra,* 354 U.S. 476, 485, 487).

In that case, the Court approved the following instruction of the trial judge:

> "The words 'obscene, lewd and lascivious', as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*"

"The test," Justice BRENNAN stated (p. 489), is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest", which test "provides safeguards adequate to withstand the charge of constitutional infirmity".

In *Matter of Excelsior Pict. Corp. v. Regents,* 3 N.Y. 2d 237, 240, (then) Judge DESMOND writing for the majority, defined the term "obscene in the sense in which the law has used that term for centu ies" as "sexu-

ally impure or filthy", and noted that "obscenity, real, serious, not imagined or puritanically exaggerated, is today, as in all past centuries, a public evil, a public nuisance, a public pollution". In his concurring opinion, Judge FULD, "in wholehearted agreement" with this latter statement, felt that the "evil * * * may be adequately dealt with by resort to the courts in the first instance, either by criminal prosecution (Penal Law, § 1141) or by injunctive process" (3 N.Y. 2d at 247). We are now called upon to deal with a criminal prosecution.

We find nothing in the First Amendment nor in the language of the *Roth* case which dictates the strict construction of section 1141 proposed by Judge FULD. By limiting the applicability of section 1141 only to what he termed "hard-core pornography", we would be adopting a far more stringent test than is required under present constitutional standards, and in effect be opening the door to obscenity so widely as to be tantamount to a repeal in large measure of section 1141. Since we may constitutionally give vitality to the legislative enactment, why is it necessary for us to strain against the definition laid down by the highest court in the land in order to permit the continued distribution of material which the average person would unhesitatingly condemn as obscene and lewd?

There is a broad area between material which all would concede is shockingly and unquestionably obscene, and matter which all would agree is clearly free of obscenity. It is urged that the critical point in the compromise lies between these two extremes, and that, quoting Judge CARDOZO (Paradoxes of Legal Science, p. 37): "All we can say is that the line will be higher than the lowest level of moral principle and practice, and

lower than the highest." Yet the determination is promptly made that the statute should apply only to the lowest level, namely, "hard-core" pornography, despite Judge CARDOZO'S further statement: "It [the law] will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous" (id. p. 37).

Courts may not abdicate their function of judging material between these two extremes by relegating it all to the area deemed free of obscenity. We do not hesitate to adjudicate similarly close and difficult situations in other branches of the law such as, *e.g.*, determining what is fraud, reasonable doubt, premeditation and deliberation—the latter situations often involving human life itself. Or, as Judge CARDOZO put it, "jurisprudence has its reasonable man, its negligent man and * * * its moral man". We cannot supply scientific definitions nor require scientific tests in matters such as these, for law itself is by no means an exact science. "They do better things with logarithms."

Applying the test laid down in *Roth v. United States, supra* (at p. 487), a test Judge FULD agrees is within the "constitutional boundaries of any permissible definition of obscenity", all eight judges below have concluded that the magazine "Gent" is obscene under the statute, and their unanimous judgment, rendered in the exercise of their "function as the spokesmen of the thought and sentiment of the community", should not be lightly set aside (*People v. Pesky*, 254 N.Y. 373, 374; *People v. Osher*, 285 N.Y. 793; *People v. Muller*, 96 N.Y. 408, 410).

The portrayal of sex in the manner presented here is "without any redeeming social worth", is not for the purpose of promoting art, literature or science, but is nothing more than a distribution of smut—dirt for dirt's sake—by a wholesale distributor to local stores and stands for the sole purpose of selfish commercial exploitation. Judges, who in their broad experience have necessarily had to deal with many sordid aspects of human life, are sometimes prone to forget that it is their duty to examine material of this kind through the eyes of "the average person", whether youth or adult. It cannot be gainsaid—and we require no scientific tests to establish it—that the overwhelming mass of people in our State, by and for whom our public policy is made, are opposed to obscenity as finally defined by the Supreme Court in the *Roth* case.

We are not privileged to rule, as a matter of law, in applying the contemporary community standards test, that the courts below were wrong in determining in effect that "the average person" would conclude that the dominant theme of "Gent" taken as a whole appeals to prurient interest. If only "hard-core" pornography may be proscribed, purveyors of magazines and periodicals—on a large scale and with almost free rein—will be at liberty to flood the newsstands and candy stores in every local community in the State with material "the average person" would condemn as obscene and lewd.

In support of the foregoing views, we now turn to the contents of the magazine itself, which we are asked to rule, as a matter of law, are not obscene. In so doing, we feel constrained to deal with it, not in the abstract as in a vacuum—lest our opinions be deemed mere logomachy—but as it was printed and portrayed for the public at large, and let it speak for itself.

Among the numerous pictures in "Gent" of nude or partially nude women, many of which are clearly sexually suggestive, is one found on page 11. It is a picture of a totally nude woman, just starting to slip on an undergarment, and saying to another nude women, whose nakedness is reflected in a mirror on the wall, "I'd better leave now—before your husband comes home." This picture clearly and openly imports lesbianism—"a debauchery of the sexual faculty". An article on page 7 describes an experience between a married man and a young woman. It tells how, while walking to her apartment, he "absorbed the view of her breasts standing out in bold relief. In his haziness, he pictured her naked from her fleshy shoulders to her liquid underbelly" (p. 9, col. 1). Then, later, she "expertly worked [her hand] down his body. Her palm pushed in his belly slightly * * *. Her breathing was louder now, and she wriggled to get into a more erotic position" (p. 9, col. 2). On page 10: he "let his finger toy with her nipples until they stood up like pencil erasers. He grabbed her, and drove his tongue to the roof of her mouth. She did it back, and soon they were rubbing and kissing and feeling, and undressing each other. They thrashed on the bed until their rythmic animal convulsions propelled them to the floor". In another article, entitled "Outline for an Anthropological Disquisition" (at page 53), the author describes a somewhat similar experience, and apologizes for his brutality but is invited by the woman to be more brutal next time.

These are but illustrative of the general content of the magazine, although there is some mild attempt at face saving by the inclusion of some material that is free from smut. In our opinion, the magazine, when read as a whole together with its photographs and illustrations, clearly comes within the test of obscenity, as out-

lined in the *Roth* case, *supra,* and even with the very narrow standard Judge FULD would set. We do not think that because cases of this kind present problems, courts should make it easy for themselves by holding that only the most depraved situations come within the purview of our statute, as in *Brown v. Kingsley,* 1 N.Y. 2d 177.

Nor do we have any doubt upon this record of the presence of scienter. Defendant is not a mere retailer, newsstand or candy store owner, but is a wholesaler and distributor engaged solely in this business and with many years of experience. Its general manager Grunin was the only officer active in its management, and he has been engaged in this business for about 40 years. Defendant had the sole and exclusive right to distribute "Gent" for the entire County of Richmond, and the magazine was distributed to approximately 102 local dealers within a period of two days.

The most cursory inspection of the magazine would have put defendant on notice as to its contents, and, even if it did not know, it may not avoid its responsibility by closing its eyes to what should have been apparent, or by deliberately avoiding ascertaining its contents. In response to questioning, the witness Grunin testified that if one of the magazines he handled contained "concededly the most obscene and pornographic pictures that anyone could imagine", he would not know about it. Indeed, he conceded that no one in the corporation was even authorized to examine the magazines distributed, even those which the corporation classified as "Men's Candids", and if one did so, he would be discharged. Clearly, in the commercial exploitation of these magazines, defendant gave the definite impression of deliberately

avoiding the acquisition of knowledge as to the nature of the products it was selling and distributing.

The order appealed from should be reversed, and the judgment of conviction and sentence imposed thereunder by the Court of Special Sessions reinstated.

* * * *

Order affirmed. Opinion by Fuld, J., in which Van Voorhis, J., concurs; opinion by Desmond, Ch. J., in which Dye, J., concurs; Froessel, J., dissents in an opinion in which Burke and Foster, JJ., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 146

JOSEPH CHOBOT,

Appellant,

v.

STATE OF WISCONSIN,

Appellee.

On Appeal From the Supreme Court of the State of Wisconsin

MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 146

JOSEPH CHOBOT,

Appellant,

v.

STATE OF WISCONSIN,

Appellee.

On Appeal From the Supreme Court of the State of Wisconsin

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the ground that:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. WHERE THE FEDERAL QUESTION PRESENTED IS SETTLED BY PREVIOUS DECISIONS OF THIS COURT IT IS INSUBSTANTIAL AND THE APPEAL WILL BE DISMISSED.

The foregoing rule is supported by the following cases:

Zucht v. King, (1922) 260 U.S. 174;

Minneapolis St. P. & S. S. M. Ry. Co. v. C. L. Merrick Co., (1920) 254 U.S. 376;

2

Heitler v. United States, (1923) 260 U. S. 438.

B. THE QUESTIONS PRESENTED UPON THIS APPEAL ARE SETTLED BY THE DECISION OF THIS COURT IN ROTH V. UNITED STATES, (1957) 354 U. S. 476.

It would be a waste of this Court's time and an unnecessary duplication in printing for us to repeat the arguments so eloquently stated in the opinion of the Wisconsin Supreme Court, *State v. Chobot,* (1961) 12 Wis. 2d 110, 106 N. W. 2d 286 (quoted in appellant's brief, pages 17-27), and of the trial court (quoted in appellant's brief, pages 27-38). These opinions clearly show that the courts below industriously applied to the facts of this case the rule so recently stated by this court in the *Roth* case. Of the 13 exhibits introduced by the state and alleged to be obscene, nine were eliminated on the ground that they did not appeal to prurient interest; only four, which are described in the opinions, were found to be obscene.

The Wisconsin Supreme Court has authoritatively construed the Wisconsin Statute, sec. 944.21 (1) (a), Wis. Stats. (quoted in App.br.p.18), in complete accord with the requirements of *Roth v. United States,* (1957) 354 U. S. 476, and any contention that the construction so placed on the Wisconsin Statute is in violation of the First and Fourteenth Amendments is utterly frivolous.

C. THE APPLICATION OF THE WISCONSIN OBSCENITY STATUTE TO THE FACTS OF THIS CASE IS NOT IN CONFLICT WITH THE FIRST AND FOURTEENTH AMENDMENTS.

The test of *Roth v. United States, supra,* involves two elements:

1. That the material alleged to be obscene appeals to prurient interest; and

2. That it goes substantially beyond the customary limits of candor, applying the standards of the community.

Upon the first point it is doubtless possible for this Court, by examining the material in question, to determine whether its dominant appeal is to prurient interest, as a matter of law. This determination has been made against four of the exhibits by the trial judge, sitting without a jury, and by the unanimous decision of the state supreme court, and reference to a description of the material found to be obscene in the opinions of the trial court (App.br.pp.33-35) and of the Wisconsin Supreme Court (App.br.pp.23-25) sufficiently shows the pornographic character of the exhibits without further argument here.

However, it seems doubtful that this Court intends to undertake the arduous function of examing material found by the state courts to be obscene, every time a convicted defendant appeals to this Court or petitions for *certiorari*. In the *Roth* case the issue of the obscenity of the material found to be obscene in the courts below was not before this Court, yet the conviction was affirmed. From the concurring-dissenting opinion of Mr. Justice Harlan it is to be assumed that the majority did not consider that the application of a correct rule of law to a specific item of literature was a federal constitutional question worthy of the attention of this Court:

> "* * * The Court seems to assume that 'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the First and Fourteenth

> Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of 'fact,' to be entrusted to a fact-finder and insulated from independent constitutional judgment. * * *" 354 U. S. at 497.

The decision of the New York Court of Appeals in the unreported case of *People v. Richmond County News, Inc.* (App.br.pp.39-61), a four to three decision of that court to the effect that the New York obscenity statute applies only to "hard-core" pornography—whatever that may be—does not make a federal question even if it be in conflict with the decision of the Wisconsin Supreme Court in this case. It may be that community standards in New York differ from those in Milwaukee county. Moreover, the New York court and the Wisconsin court were not talking about the same material. The description of the article and pictures involved in the New York case (App.br.p.59) lacks the elements of depravity involved in the Wisconsin case and referred to in the opinions of both courts below (App.br.pp.23-24,34). The two cases are therefore distinguishable on their facts, but they represent at most a divergence of opinion between the two courts within the scope of constitutional limits.

But it is submitted that the majority opinions in the New York case go substantially beyond the constitutional requirements of *Roth v. United States,* (1957) 354 U. S. 476. Nothing in that decision limits the definition of obscenity to "hard-core" pornography, and it appears from the concurring-dissenting opinion of Justice Harlan that the material there involved "cannot be said to be hard-core pornography." 354 U. S. at 508. Nevertheless, the Court affirmed the conviction.

Counsel argues that the following cases are in conflict with the decision of the Wisconsin courts in this case:

Mounce v. United States, (1957) 355 U. S. 180;

One v. Olesen, (1957) 355 U. S. 371;

Times Film Corp. v. City of Chicago, (1957) 355 U. S. 35;

Sunshine Book v. Summerfield, (1957) 355 U. S. 372.

A study of each of these cases clearly establishes that the tests applied by the courts below were not in accord with the test of obscenity approved in *Roth v. United States*, (1957) 354 U. S. 476. In this case the Wisconsin Supreme Court concluded that the reason for reversal in each of those cases was the failure to apply the *Roth* case rule, not a determination that the material in question was, as a matter of law, not obscene (App.br.pp. 24-25).

The second test, the standards of the community, cannot without extreme difficulty be applied by this Court. It is submitted that the trial judge in this case, performing the functions of a jury, is in a much better position to appraise the community standards of Milwaukee county.

In *Roth v. United States*, (1957) 354 U. S. 476, 490, this Court approved an instruction which told the jury, in part, "You may *ask yourselves* does it offend the common conscience of the community by present-day standards. * * * In this case * * * *you and you alone are the exclusive judges of what the common conscience of the community is*, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious—men and women and children."

In the present case the trial judge was performing the functions of a jury and it was therefore his duty to determine the common conscience of the community, which he did (App.br. p.35).

Appellant attempts to make a bootstrap argument founded upon the sale in Milwaukee of *Playboy* Magazine, *Peyton Place* and *Lady Chatterley's Lover*. The evidence disclosed that sale of these items was proportionately very small compared with the total of other paperback books, and magazines such as *Readers Digest* (R.60,67,71,83). Even if it be assumed that these books and magazines are of the same kind as the material found by the trial court to be obscene, their relatively meager distribution in the community falls far short of establishing a standard for the community as a whole—if anything it shows rejection of such literature by the overwhelming majority of the population. It cannot be the law that by obtaining *some circulation* for pornographic literature (if that be the case), magazine and book vendors can thereby set a standard for a community which would justify further circulation of like material from that time forward.

The trial court held that the evidence of sales of like material bore no weight as indicative of contemporary community standards not only because it was insignificant but also because the area in the main went beyond the community concerned in this case (App.br.p.35). The state supreme court accepted the trial court as the "exclusive judge of what the common conscience of the community is . . . as a whole." (App.br.p.23.)

Appellant argues (br.pp.7-9), that the "clear and present danger" rule applies in the field of legislation against obscenity. It is a sufficient answer to this contention that this Court quite plainly and unambiguously rejected it in *Roth v. United States*, (1957) 354 U. S. 476, 488, citing and quoting from *Beauharnais v. Illinois*, (1951) 343 U. S. 250, 266.

It is therefore respectfully submitted that the application of the Wisconsin obscenity statute to the material in this case was strictly in accordance with the rules announced by this

court in the *Roth* case, was not erroneous as a matter of law, and presents no substantial question of federal constitutional right.

D. Evidence in this Case Sufficiently Established Scienter.

On this point, again, it seems unnecessary to repeat what was said by the Wisconsin Supreme Court (App.br.pp.25-27) and the trial court (App.br.pp.37-38).

The statute requires proof of *scienter*: "Whoever *intentionally* does any of the following may be" punished as provided in the statute. Sec. 944.21 (1), Wis. Stats.

"• • •

In the Wisconsin Criminal Code the element of *scienter* is included in the definition of criminal intent. This is shown by the following Wisconsin statutes:

> "939.22 Words and phrases defined. In the criminal code, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:
>
> "• • •
>
> "(18) 'Intentionally' has the meaning designated in s. 939.23.
>
> "939.23 Criminal intent. (1) When criminal intent is an element of a crime in the criminal code, such intent is indicated by the term 'intentionally', the phrase 'with intent to', the phrase 'with intent that', or some form of the verbs 'know' or 'believe'.
>
> "(2) 'Know' requires only that the actor believes that the specified fact exists.
>
> "(3) 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or

lieves that his act, if successful, will cause that result. *In addition,* except as provided in sub. (6), *the actor must have knowledge of those facts which are necessary to make his conduct criminal* and which are set forth after the word 'intentionally'."

Therefore, since the obscenity statute requires *scienter* by requiring that the acts be done "intentionally," the rule of *Smith v. California,* (1959) 361 U. S. 147 is inapplicable, and the trial court specifically found upon sufficient evidence that the defendant was aware of the appeal of the material sold to prurient interest (App.br.p.38). The state supreme court affirmed this ruling (App.br.pp.26-27).

The state supreme court drew from the majority opinion and the concurring opinion of Mr. Justice Frankfurter in the *Smith* case in testing the sufficiency of the proof of *scienter* in the instant case. It is respectfully submitted that there is no substantial federal question presented on this issue.

It is therefore respectfully submitted that the appeal herein be dismissed and that certiorari be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 146

JOSEPH CHOBOT,
Appellant

vs.

STATE OF WISCONSIN,
Appellee

On Appeal From the Supreme Court, State of Wisconsin

REPLY

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IN THE

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REPLY

The State argues (Appellee's Brief, pp. 3-4) that the Wisconsin courts simply decided a "question of fact" and that Mr. Justice Harlan was alone in stating that each application of an obscenity law to a writing involves a "constitutional judgment".

However, since *Roth vs. United States,* (1957) 354 U.S. 476, this Court has shown its support of the view taken by Justice Harlan on this issue. *Mounce vs. United States,* (1957) 355 U.S. 180; *One vs. Olesen,* (1957) 355

U.S. 371; *Sunshine Book vs. Summerfield,* (1957) 355 U.S. 372; *Times Film Corp. vs. City of Chicago,* (1957) 355 U.S. 35; *Kingsley Pictures Corp. vs. Regents,* (1959) 360 U.S. 684.

If the constitutional safeguards of free speech and press are so frail as to be subordinated to the determination of one judge or a jury by the gloss of "issue of fact", then the fundamental protections of speech and press are indeed seriously undermined, and there is a necessity for this Court to speak out and clarify the question.

The State has sought to argue away *People v. Richmond County News, Inc.*, unreported, — — N.Y. — —, — — N.E. 2nd — —, (Appellant's Brief, pp. 39-61), by asserting that community standards of New York and Wisconsin are different and by asserting that the elements of "depravity" in the respective magazines are different (P. 4, Appellee's Brief). This argument entirely misses the point. The point of *People vs. Richmond County News, Inc.* (supra) is that if any material other than "hard-core pornography" as at least limited by Judge Fuld in the New York Opinion (Appellant's Brief, pp. 39-51) is to be suppressed by *any* state, how can we reconcile such suppression with the free press guaranties of the Constitution.

Neither *Roth* nor the cases following *Roth* intimate that the constitutional protection does not apply to the entertaining and amusing, as well as to the informative. If obscenity laws may be arbitrarily applied beyond "hard-core pornography", the Supreme Court should be heard from.

The State's discussion of "contemporary community standards" and the trial judge's role therein seems clearly fallacious (Appellee's Brief, p. 6).

Appellant introduced books and magazines freely and substantially sold and delivered in the Milwaukee County area, (R. 119, 120, 121, 122, 125, 126) (See, too, Exhibits 14-26), as material which constituted community standards. The trial court held that the material went beyond the community concerned in this case and disregarded appellant's exhibits. But that is no reason for disregarding such material "as beyond the community concerned in this case", (Appellee's Brief, p. 6).

The State argues that the trial judge really decides the question by his own notion of what the community standards are, echoing the Wisconsin Supreme Court's language, "exclusive judge of what the common conscience of the community is," (Appellant's Brief, p. 23), and that is clearly constitutional error.

With respect to scienter, the State has failed to distinguish *Smith vs. California,* (1959) 361 U.S. 147. In the instant case, the lower courts themselves, after examining thirteen magazines submitted by the prosecution as obscene, all containing many pictures of nudity, found that nine of the magazines "did not appeal to prurient interest and go substantially beyond the customary limits of candor applying the standards of the community", but that four did. Is this due process? Can the circulation of a free press be unimpeded if standards like these prevail? We think not, and respectfully submit that the State's Motion to Dismiss Appeal be denied.

Respectfully submitted,

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IN THE

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On Appeal From the Supreme Court,
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MOTION FOR REHEARING OF ORDER DISMISSING APPEAL

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IN THE

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On Appeal From the Supreme Court,
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MOTION FOR REHEARING OF ORDER DISMISSING APPEAL

Appellant prays this Court for a rehearing of its order of October 23, 1961, wherein this Court, by a vote of 6-3, dismissed the appeal to review the judgment of the Supreme Court of the State of Wisconsin as prayed for in the appeal filed September 18, 1961, herein.

REASONS FOR GRANTING REHEARING

This Court has not yet made a clear legal determination on the two main issues of the case at bar. The first issue is whether nudity as such may, as a matter of law, be held to be obscene. The second issue is whether the concept of obscenity held by the Court is that of hard-core pornography.

Clarification by this Court will undoubtedly prevent wholesale chaos in many of the fifty states with respect to retail merchants who sell magazines containing pictures of nude and semi-nude women. Under the present cases, these merchants cannot possibly predetermine whether or not a magazine is obscene. Surely the circulation of a free press is impeded if standards for determining obscenity are so vague.

In the present case, the trial and appellate courts found four of thirteen magazines obscene. Of the four magazines, the lower courts found only Exhibit No. 10, *Spice* magazine, to have any obscene stories. Exhibits 8, 9, and 12, *Adam, Blondes, Brunettes and Redheads* and *Spree,* were found to be obscene because they contained "photographs of nudes interspersed with partially and scantily clothed models, some reclining in provocative poses." This conclusion is contrary to a decision of this Court.

Sunshine Book Company v. Summerfield, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 352, involved a nudist magazine.

The Court of Appeals in *Sunshine Book Company v. Summerfield,* 294 F. (2d) 114, quoted with approval the language of *Sunshine Book v. McCaffrey,* 8 Misc. (2d) 327, 112 N.Y.S. (2d) 476, 483, that:

> "Where the dominant purpose of nudity is to promote lust, it is obscene and indecent. The distribu-

> tion and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses . . . Men, women, youth of both sexes, and even children, can purchase those magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disasterous." 249 F. (2d) 114, 118, 119.

The Court of Appeals decided *Summerfield* after *Roth-Alberts*. The United States Supreme Court in *Sunshine Book v. Summerfield*, 355 U.S. 372, reversed on the citation of *Roth-Alberts*, thus terminating the litigation and giving final protection to the material. Thus, nudity, in and of itself, as a matter of law cannot be found obscene.

The second issue which fairly cries out for Supreme Court clarification is whether this Court's concept of obscenity is synonymous with hard-core pornography.

Thus far, three State appellate courts have dealt with the above question, bringing about a conflict of decisions among highest State courts. New York in *The People v. Richmond News, Inc.*, 9 N.Y. (2d) 578, 216 N.Y.S. (2d) 369, 175 N.E. (2d) 681, held that printed matter could be prohibited as obscenity only if the matter were hard-core pornography. (See pp. 39-61 Appellant's Jurisdictional Statement.) The State of Wisconsin held to the contrary in the present case, and in the most recent case, *Monfred v. State*, 173 A. (2d) 173, the highest court of Maryland rejected the hard-core pornography concept albeit with a vigorous dissent. *Monfred v. State*, involved identical subject matter as the case at bar.

A telephone conversation with the attorney for *Monfred v. State* (supra) revealed the fact that a Petition for Certiorari was filed with this Court a few days ago. Accordingly, this Court can clarify the issue of obscenity with respect to hard-core pornography.

It should be noted that two authors who have written extensively in this field have opined of *Roth-Alberts,*

> "In voting to sustain the constitutionality of the obscenity statutes of California and of the United States, Justices Frankfurter, Burton, Clarke, Brennan and Whittaker must have had material of this kind in mind for hard-core pornography, particularly in pictorial form, is so blatantly shocking and revolting that it would have been impossible for the Justices to put it out of mind. Since the basic issue before the Court was only the constitutionality of the statutes on their faces and in a vacuum, without regard to their application in the two cases, it seems likely that the Court upheld their constitutionality as imaginatively applied to hard-core pornography.
>
> "We conclude therefore that the concept of obscenity held by most members of the Court is probably hard-core pornography, a conclusion consistent with the Court's rejection of obscenity as utterly without redeeming social importance." *Censorship of Obscenity: The Developing Constitutional Standards.* 45 Minn. L. Rev. 5 (1960) Lockhart and McClure.

The Solicitor General in the *Roth-Alberts* case supplied the Court with a good description of hard-core pornography. Essentially his description was that of,

> " . . . commercially-produced material in obvious violation of present law . . . manufactured clandestinely in this country or abroad and smuggled in . . . photographs of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts . . . drawings of perversions

> of various kinds . . . films showing people of both sexes engaged in orgies which again include every form of sexual activity known . . ." (for entire Solicitor General's description of pornography, see *Monfred v. State*, 173 A. (2d) 173, note 4, at P.P. 183, 184)

The Court may also choose to accept Chief Justice Warren's concept of "variable obscenity" expressed by him in his concurring opinion in the *Roth-Alberts* case to the effect that the question of obscenity must turn, not on the material itself but on the motives of the seller. In the existing case, since the sales were strictly commercial, a variable obscenity test may well be applicable. If the variable obscenity test were adopted, the appellant in the present case would be exonerated inasmuch as the magazines were openly sold and in fact purchased by uniformed police officers.

In addition to Petition for Certiorari in *Monfred v. State* (supra) having been filed after this Court dismissed appellant's appeal, there is also pending *Oakley v. United States*, No. 167, Petition for Certiorari filed June 22, 1961, wherein the following two issues are before this Court: First, are unretouched pictures of nude women obscene within the meaning of *Roth v. United States*, 354 U.S. 476, and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, and second, should the fact that defendant believes his pictures not to be obscene be taken into account in determining his guilt or innocence.

CONCLUSION

The Supreme Court in *Roth v. United States,* 354 U.S. at p. 488 said, speaking of the fundamental freedoms of speech and press, that

> "ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and State intrusion in this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

If the conviction is allowed to stand in the present case without further opinion, the door barring State intrusion in this area will be left open wide enough to drive a truck through.

For the reasons set forth above and in the Jurisdictional Statement of appellant, it is respectfully urged that rehearing be granted and that upon such rehearing this Court assert jurisdiction to hear the appeal on its merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing motion for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Max Raskin

Counsel for Appellant